

85th Legislative Session – 2010

Committee: Senate Judiciary

Thursday, February 11, 2010

P - Present
E - Excused
A - Absent

Roll Call

P Gillespie
P Heidepriem
P Schmidt
P Turbak Berry
P Vehle
P Tieszen, Vice-Chair
P Abdallah, Chair

OTHERS PRESENT: See Original Minutes

The meeting was called to order by Senator Gene G. Abdallah, Chair.

MOTION: TO APPROVE THE MINUTES OF TUESDAY, FEBRUARY 9, 2010

Moved by: Tieszen
Second by: Vehle
Action: Prevailed by voice vote.

MOTION: TO APPROVE THE MINUTES OF THURSDAY, FEBRUARY 4, 2010

Moved by: Vehle
Second by: Tieszen
Action: Prevailed by voice vote.

THE CHAIR DEFERRED SB 179 UNTIL TUESDAY, FEBRUARY 16, 2010

SB 103: revise certain provisions relating to trusts.

Presented by: Senator Dave Knudson
Proponents: Bret Afdahl, Department of Revenue & Regulation

MOTION: AMEND SB 103

103ja

On page 10, line 16, of the printed bill, delete "54" and insert "55".

On page 11, between lines 8 and 9, insert:

" Section 10. That chapter 55-4 be amended by adding thereto a NEW SECTION to read as follows:

A certificate of a trustee or of trustees of a trust in support of a real property transaction may be substantially in the following form:

This instrument was prepared by:

(insert name, address and phone number)

CERTIFICATE
OF TRUST

STATE OF SOUTH DAKOTA)

: SS

COUNTY OF MINNEHAHA)

_____, being duly sworn under oath, does hereby state as follows:

1. A trust instrument or Will executed on _____ established a trust which is still in existence on the date this Certificate is signed. The name of the trust, if it has been named, is _____. (Insert n/a if the Trust does not have a name)
2. The name of the settlor, grantor, trustor, testator or testatrix, as the case may be, is _____.
3. The name of each original trustee and the name and address of each trustee and each trust protector currently empowered to act under the trust instrument or Will on the date of the execution of this Certificate of Trust is as follows:

_____.

4. The person who signs this certificate below certifies that the trust instrument or Will contains the following powers which are given to the trustee:

_____,
the following powers are given to the trust protector:

_____,
and further contains the following provisions:

_____.
The number of trustees required to join in an action by the provisions of the trust instrument or Will to is _____.

5. The trust is revocable/irrevocable./The following person(s) has/have the right to revoke the trust:

_____.
The trust has not been revoked.

6. The trust is/is not supervised by a court. The following restrictions are currently imposed by the court on the trustee(s) ability to act even though actions so restricted may be permitted by statute or the terms of the trust instrument or Will:

_____.

7. The Trustee intends to convey the following property owned by the Trust:

_____.

8. The trust has not been modified or amended in any manner that would cause the representations contained in this Certificate of Trust to be incorrect. The statements contained in this Certificate of Trust are true and correct.

STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF)

On this, the ____ day of _____, 20____, before me, the undersigned officer, personally appeared , known to me or satisfactorily proven to be the person whose name is subscribed to the within instrument and acknowledged that she/he executed the same for the purposes therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

Notary Public, South Dakota
My Commission expires: _____".

On page 12, delete lines 6 to 24, inclusive, and insert:

"

(a) After the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that was revocable at the settlor's death is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains, and statutory allowances to a surviving spouse and children to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, and expenses.

(b) A trustee may:

- (1) If the trustee has knowledge of a creditor or potential creditor, provide written notice to the creditor or potential creditor at their last known address, advising the creditor that a claim may not be paid if the creditor fails to present a claim within sixty days of the date of such notice; and
- (2) For all unknown creditors and all creditors which the trustee, in good faith, is unable to locate, publish notice to such creditors once a week for three successive weeks in a legal newspaper in the county:
 - (A) Where the settlor was last a resident if the deceased settlor was a resident of South Dakota; or
 - (B) Where the principal administration of the trust takes place if the deceased settlor was a nonresident of South Dakota.

The published notice shall state that creditors of a deceased settlor must present their claim within four months after the date of the first publication of the notice or any claim or collection efforts which otherwise could have been asserted or enforced against the trust or assets thereof may be barred.

For purposes of this section, a trustee has knowledge of a creditor or potential creditor if the trustee is aware that the creditor has demanded payment from the settlor or the settlor's estate.

(c) Creditors of the deceased settlor who are given written notice or receive notice by publication are barred if no claim is filed within the applicable period.

(d) Claims by a creditor of a deceased settlor may be presented to the trustee by any of the

following three methods:

- (1) The creditor may deliver or mail to the trustee a written statement of the claim indicating its basis, the name and address of the creditor, and the amount claimed;
- (2) If the trust is court-supervised, the creditor may file a written statement of the claim with the clerk of courts and mail or deliver a copy thereof to the trustee. The claim is deemed presented on the first to occur of the receipt of the written statement of claim by the trustee, or the filing of the claim with the clerk of courts; or
- (3) The creditor may commence a proceeding against the trust in any court where the trustee may be subject to jurisdiction, to obtain payment of the claim. Such a claim is deemed presented on the date the proceeding is commenced.

(e) If a claim is not yet due, the date when it will become due shall be stated in the written statement of the claim. If the claim is contingent or unliquidated, the nature of the uncertainty shall be described. If the claim is secured, the nature of the security shall be described. Failure to describe correctly the nature of the security or uncertainty, or the due date of a claim not yet due, does not invalidate the presentation.

(f) No presentation of claim is required in regard to matters claimed in proceedings against a settlor which were pending at the time of the death of the settlor in any court.

(g) No trustee may incur liability for a nonnegligent or nonwillful failure to give notice to a particular creditor.

(h) If the applicable assets of the trust that are otherwise subject to the claim of an unbarred creditor are insufficient to pay the claim in full, the trustee shall make payment in the following order:

- (1) Costs and expenses relating to administration of the trust or estate;
- (2) Reasonable funeral expenses of the settlor;
- (3) Debts and taxes with preference under federal law;
- (4) Debts and taxes with preference under other laws of this state;
- (5) All other claims.

(i) In paying claims of a deceased settlor, the trustee shall give no preference in the payment of any claim over any other claim of the same class, and a claim due and payable is not entitled to a

preference over claims not yet due except as to claims which are compromised in part or in full.

(j) Upon the death of the settlor of a trust that was revocable at the settlor's death, the trustee may proceed to pay creditor claims with the trust property in accordance with the terms of the trust and this section. The trustee is not subject to liability for doing so unless:

- (1) The trustee knows of a pending proceeding contesting the validity of the trust or regarding a creditor's claim; or
- (2) A potential contestant or creditor has notified the trustee of a possible proceeding to contest the trust or regarding a creditor's claim, and a proceeding is commenced within sixty days after the contestant sent the notification.

However, the trustee may pay creditor claims without liability so long as the trustee determines that, at the time of the determination, the assets of the trust are reasonably adequate to allow for payment of the claim in view of the type of proceeding, the amount at issue, and the likelihood of its probable success.

(k) A creditor who has received a payment from the trustee, if it is later determined to have been invalid, or wrongfully paid under this section, is liable to return any payment received to the trustee. If the creditor refuses to return the payment, the creditor may be liable for all costs, including attorney's fees, incurred for the recovery of the payment.

(l) Except as to creditors barred by publication or by written notice, the statute of limitations provisions of §§ 29A-3-802(b) and 29A-3-803(a)(3) apply.

(m) Nothing in this section requires a trustee to give notice to a secured creditor of a settlor, nor diminish the rights of a secured creditor under applicable law."

Delete pages 13 and 14, inclusive.

On page 25, after line 17, insert:

" Section 27. That § 55-16-5 be amended to read as follows:

55-16-5. Any individual may serve as ~~a fiduciary~~ an investment trust advisor described in subdivision ~~55-1B-1(4)~~ 55-1B-1(6), notwithstanding that such individual is the transferor of the qualified disposition, but such an individual may not otherwise serve as a fiduciary of a trust that is a qualified disposition except with respect to the retention of the veto right permitted by subdivision 55-16-2(2)."

Moved by: Vehle
Second by: Heidepriem
Action: Prevailed by voice vote.

MOTION: DO PASS SB 103 AS AMENDED

Moved by: Vehle
Second by: Heidepriem
Action: Prevailed by roll call vote. (7-0-0-0)

Voting Yes: Gillespie, Heidepriem, Schmidt, Turbak Berry, Vehle, Tieszen, Abdallah

MOTION: PLACE SB 103 ON CONSENT CALENDAR

Moved by: Tieszen
Second by: Heidepriem
Action: Prevailed by voice vote.

SB 43: authorize the Public Utilities Commission to recover and disburse certain damages on behalf of retail customers of telecommunications companies.

Presented by: Rolayne Wiest, Public Utilities Commission

MOTION: DEFER SB 43 TO THE 41ST LEGISLATIVE DAY

Moved by: Heidepriem
Second by: Tieszen
Action: Prevailed by roll call vote. (7-0-0-0)

Voting Yes: Gillespie, Heidepriem, Schmidt, Turbak Berry, Vehle, Tieszen, Abdallah

SB 44: authorize the Public Utilities Commission to conduct certain rule-making proceedings by teleconference.

Presented by: Rolayne Wiest, Public Utilities Commission

MOTION: DEFER SB 44 TO THE 41ST LEGISLATIVE DAY

Moved by: Vehle
Second by: Gillespie
Action: Prevailed by roll call vote. (7-0-0-0)

Voting Yes: Gillespie, Heidepriem, Schmidt, Turbak Berry, Vehle, Tieszen, Abdallah

MOTION: MOVED THAT THE CONSENT CALENDAR VOTE BY WHICH SB 103 WAS PASSED, BE RESCINDED

Moved by: Heidepriem

Second by: Vehle

Action: Prevailed by voice vote.

SB 12: provide for a tiered sex offender registry and to establish certain criteria for eligibility to petition for removal or reassignment.

MOTION: AMEND THE PENDING AMENDMENT

12ro

On the previously adopted amendment (12rb) in Section 2, before subdivision (3), insert:

"or

- (d) Sexual contact under § 22-22-7 if the victim was between the ages of thirteen and sixteen and the petitioner was at least three years older than the victim, but only if the petitioner was twenty-two years of age but not more than twenty-five years of age at the time the offense was committed;"

Moved by: Gillespie

Action: Died for lack of a second.

MOTION: DO PASS SB 12 AS AMENDED

Moved by: Heidepriem

Second by: Gillespie

Action: Prevailed by roll call vote. (7-0-0-0)

Voting Yes: Gillespie, Heidepriem, Schmidt, Turbak Berry, Vehle, Tieszen, Abdallah

SB 5: revise certain provisions relating to the registration of juvenile sex offenders.

Opponents: Marty Jackley, Attorney General

Ryan Kolbeck, SD Assn. of Criminal Defense Lawyers

MOTION: DEFER SB 5 TO THE 41ST LEGISLATIVE DAY

Moved by: Tieszen
Second by: Schmidt
Action: Prevailed by roll call vote. (7-0-0-0)

Voting Yes: Gillespie, Heidepriem, Schmidt, Turbak Berry, Vehle, Tieszen, Abdallah

SB 6: revise the criteria for removal from the sex offender registry.

Opponents: Marty Jackley, Attorney General
Ryan Kolbeck, SD Assn. of Criminal Defense Lawyers

MOTION: DEFER SB 6 TO THE 41ST LEGISLATIVE DAY

Moved by: Tieszen
Second by: Schmidt
Action: Prevailed by roll call vote. (7-0-0-0)

Voting Yes: Gillespie, Heidepriem, Schmidt, Turbak Berry, Vehle, Tieszen, Abdallah

SB 9: limit misdemeanor eligibility for registration on the sex offender registry.

Opponents: Marty Jackley, Attorney General
Ryan Kolbeck, SD Assn. of Criminal Defense Lawyers

MOTION: DEFER SB 9 TO THE 41ST LEGISLATIVE DAY

Moved by: Tieszen
Second by: Schmidt
Action: Prevailed by roll call vote. (7-0-0-0)

Voting Yes: Gillespie, Heidepriem, Schmidt, Turbak Berry, Vehle, Tieszen, Abdallah

SB 167: provide for the reconfiguration of the South Dakota sex offender registry to facilitate enhanced utilization by the public.

Presented by: Senator Sandy Jerstad
Proponents: Marty Jackley, Attorney General

MOTION: DEFER SB 167 TO THE 41ST LEGISLATIVE DAY

Moved by: Tieszen
Second by: Vehle
Action: Prevailed by roll call vote. (6-1-0-0)

Voting Yes: Gillespie, Schmidt, Turbak Berry, Vehle, Tieszen, Abdallah

Voting No: Heidepriem

SB 132: permit the utilization of certain DNA samples to determine parentage under certain conditions.

Presented by: Senator Tom Hansen
Proponents: Charlie McGuigan, Office of the Attorney General

MOTION: AMEND SB 132

132ra

On page 1, line 7, of the printed bill, delete "to determine parentage".

Moved by: Tieszen
Second by: Heidepriem
Action: Prevailed by voice vote.

MOTION: DO PASS SB 132 AS AMENDED

Moved by: Heidepriem
Second by: Vehle
Action: Prevailed by roll call vote. (7-0-0-0)

Voting Yes: Gillespie, Heidepriem, Schmidt, Turbak Berry, Vehle, Tieszen, Abdallah

SB 163: revise the penalty for first degree manslaughter.

Presented by: Senator Jim Bradford (Handouts: #1)
Representative Richard Engels
Proponents: Brad Schreiber, SD Assoc. of Criminal Defense Lawyers
Opponents: Charles McGuigan, Office of Attorney General

MOTION: DO PASS SB 163

Moved by: Turbak Berry
Second by: Gillespie
Action: Failed by roll call vote. (2-5-0-0)

Voting Yes: Gillespie, Turbak Berry

Voting No: Heidepriem, Schmidt, Vehle, Tieszen, Abdallah

MOTION: DEFER SB 163 TO THE 41ST LEGISLATIVE DAY

Moved by: Tieszen
Second by: Vehle
Action: Prevailed by roll call vote. (6-1-0-0)

Voting Yes: Gillespie, Heidepriem, Schmidt, Vehle, Tieszen, Abdallah

Voting No: Turbak Berry

THE CHAIR DEFERRED SB 185 UNTIL TUESDAY, FEBRUARY 16, 2010

MOTION: ADJOURN

Moved by: Gillespie
Second by: Tieszen
Action: Prevailed by voice vote.

Rena Ortbahn
Committee Secretary

Gene G. Abdallah, Chair